

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1439

WILLIAM RILEY HUGHES,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

MOTION TO AFFIRM JUDGMENT OF STATE COURT

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June, 1978

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MOTION TO AFFIRM

Pursuant to Rule 16 of this Court, comes now the appellee in the above-styled and numbered cause, by and through the Office of Attorney General of Oklahoma, and moves this Honorable Court to affirm the Judgment of the Oklahoma Court of Criminal Appeals for the reason that the singular decision cited by appellant to support his argument as to the substantiality of a federal question, *Foster-Fountain Packing Company v. Haydell*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), is clearly distinguishable and that the question urged by appellant has been plainly foreclosed by prior decisions of this Court, making further argument unnecessary.

QUESTION PRESENTED

Is paragraph B within 29 O.S. Supp. 1974, § 4-115 repugnant to Article I, Section 8, ch. 3, United States Constitution?

STATEMENT OF THE CASE

Appellee accepts appellant's Statement of the Case and agrees that the opinion below, which appears at 572 P.2d 573, fairly and correctly states the facts.

ARGUMENT

Appellant contends that paragraph B within the following section of Oklahoma law is an impermissible exercise of police power which is exclusively held by the Congress of the United States.

Title 29 O.S. Supp. 1974, § 4-115 provides:

"MINNOW DEALER'S INTERSTATE LICENSE

"A. No person may ship or transport minnows for sale into this State from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the State which were seined or procured within the waters of this State except that:

 1. Nothing contained herein shall prohibit any person from leaving the State possessing three (3) dozen or less minnows;

 2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

 1. For residents, one hundred dollars (\$100.00);

 2. For nonresidents, three hundred dollars (\$300.00).

"D. Any person convicted of violating any provisions (sic) of this section shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than two hundred dollars (\$200.00)."

In *Foster*, 278 U.S. at 12-13, 73 L.Ed. at 154, this Court contrasted the case then before it with *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896) and cases cited therein, stating in pertinent part:

"The purpose of the Louisiana Enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. . . . As representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. . . . Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the shrimp for the benefit of its people."

Thus, Louisiana had effectively reserved for domestic canneries the commercial exploitation of raw shrimp for interstate sale, while in the instant case, Oklahoma does not permit commercial export of minnows *ferae naturae*, directly or indirectly by anyone, resident or non-resident.

The underlying factual situation in the *Foster* decision is also clearly distinguishable. In the instant case, appellant does not contend that survival of his business is dependent upon purchases from minnow dealers or that he could not have purchased minnows from a commercial hatchery which develops its own stock. As noted in the opinion below, any person may purchase minnows from a commercial hatchery in Oklahoma and such minnows may be freely exported per 29 O.S. Supp. 1974, § 7-602, paragraph B(5), which provides:

"5. Minnows, fish, game and other wildlife lawfully bred or propagated may be knowingly sold, shipped or transported within or without this State."

Thus, the instant case is clearly distinguishable from *Foster-Fountain Packing Company v. Haydell*, *supra*, and language within that decision refutes rather than supports appellant's view. Succinctly stated, appellee submits that the appellant, an out-of-state dealer in minnows, has no constitutional right to take minnows initially derived from Oklahoma streams for commercial exportation, thereby depleting a natural resource, where Oklahoma law also bars its own citizens from such commercial exportation.

Further, prior decisions of this Court have effectively resolved the issue here raised, notably, *Lacoste v. Department*

of Conservation, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1928), and *Geer v. Connecticut*, *supra*. In the latter case, this Court stated:

"In other words, the sole issue which the case presents is, was it lawful under the Constitution of the United States (Section 8, Article 1) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the State, and yet to forbid their transportation beyond the State? Or, to state it otherwise, had the State of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?"

This Court's well-reasoned opinion therein recognized the distinction of *animus ferae naturae* from commercial enterprises. If Oklahoma permitted her natural minnows taken from its waters to be sold by its own citizens in interstate commerce, certainly a different question would be posed. But we do not have that situation here. Appellee submits the decision and rationale in *Geer v. Connecticut*, *supra*, is on point with the facts of this case and is decisive of the issue raised here. No case cited by appellant purports to require the states to surrender control of their *animus ferae naturae* in the name of interstate commerce.

Wherefore, premises considered, appellee prays that the instant motion be sustained and the judgment of the Oklahoma Court be affirmed.

Respectfully submitted,

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June, 1978

CERTIFICATE OF SERVICE

I, Bill J. Bruce, a member of the Bar of the Supreme Court of the United States, certify that three copies of the attached Motion was air mailed with sufficient postage prepaid on the _____ day of June, 1978, to the following counsel for appellant:

Mr. R. M. Helton
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BILL J. BRUCE